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No. 07-766

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In the Supreme Court of the United States

GERALD RAYBORN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the church that petitioner burned was "used in interstate * * * commerce or in any activity affecting interstate * * * commerce" as required by 18 U.S.C. 844(i).

2. Whether the evidence was sufficient to support petitioner's conviction under Section 844(i).

3. Whether the district court committed reversible error in allowing evidence of petitioner's access to and control over church finances to be introduced at trial in order to prove that petitioner would benefit financially from the insurance paid as a result of the church fire and thus establish his motive to commit arson.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 495 F.3d 328. A prior opinion of the court of appeals is reported at 312 F.3d 229. A prior opinion of the district court is reported at 138 F. Supp. 2d 1029.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2007. The petition for a writ of certiorari was filed on October 23, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Tennessee, petitioner was convicted of maliciously destroying a building by fire, in violation of 18 U.S.C. 844(i), and mail fraud, in violation

of 18 U.S.C. 1341. He was sentenced to 60 months of imprisonment, to be followed by two years of supervised release. The court of appeals affirmed. Pet. App. 1-35.

1. On August 25, 1998, the New Mount Sinai Missionary Baptist Church in Memphis, Tennessee, was destroyed by fire. Pet. App. 3. On December 16, 1999, a federal grand jury returned an indictment charging petitioner, the church's pastor, with one count of arson, in violation of 18 U.S.C. 844(i). Pet. App. 3. Section 844(i) establishes criminal penalties for any person who "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." The indictment also charged petitioner with two counts of mail fraud, in violation of 18 U.S.C. 1341, based upon an alleged attempt to collect money from the church's insurer after setting the fire. Pet. App. 3. Petitioner pleaded not guilty and moved to dismiss the arson count of the indictment, arguing that his alleged conduct was not covered by Section 844(i) because the victimized church "was not used in interstate commerce or in an activity affecting interstate commerce." 312 F.3d 229, 232 (6th Cir. 2002).

The parties subsequently entered into a stipulation concerning the links between the church and interstate commerce. The stipulation explained that the church was located less than five miles from the Mississippi border and approximately 15 miles from the Arkansas border, and that the church drew its approximately 6000 members from Tennessee, Mississippi, and Arkansas. Pet. App. 14. The stipulation also stated that the church regularly broadcast its services on four radio stations,

one of which was located in Mississippi, and that the broadcast was heard in all three States. *Ibid.*; 312 F.3d at 234. Paying for those broadcasts constituted a regular expense of the church, totaling almost $17,000 in 1997. Pet. App. 14. One of the radio broadcasts advertised a choir concert open to the public for which admission was charged, and the broadcasts regularly mentioned other church-sponsored events that were free and open to the public, such as Sunday breakfast buffets and church picnics. *Id.* at 14-15. Based upon those stipulated facts, the district court held that the church did not actively engage in activities that substantially affected interstate commerce and that petitioner's alleged conduct therefore was not covered by Section 844(i). 138 F. Supp. 2d 1029, 1036 (W.D. Tenn. 2001).

2. The court of appeals reversed and remanded. 312 F.3d at 231-236. The court held that the stipulated facts established that the church's activities had a "direct, regular, and substantial" effect on interstate commerce, and that the arson alleged in this case was therefore covered by Section 844(i). *Id.* at 234. The court of appeals placed particular emphasis on the church's use of paid radio broadcasts reaching three States as a regular aspect of its evangelism. *Ibid.* Those broadcasts, the court explained, caused increased travel into Tennessee by persons who then gave money to the church. *Ibid.* The court further observed that, "[b]ecause of its location, which is less than five miles to Tennessee's border with Mississippi and no more than fifteen miles to the border with Arkansas, the church drew members from Tennessee, Arkansas, and Mississippi." *Ibid.* The court also noted that "the use of the radio broadcasts clearly encompassed active employment of commercial entities, including three radio stations in Tennessee and one in

Mississippi," and that "the church paid $17,000 in 1997 to the various radio stations for its broadcasts." *Ibid.*

The court of appeals concluded that "the government has provided sufficient evidence to permit a rational jury to find that the church was actively employed in commercial activities with an effect on interstate commerce." 312 F.3d at 235. The court acknowledged that other circuits had held Section 844(i) to be inapplicable to acts of arson committed at particular churches, but it found those cases to be distinguishable on their facts. *Ibid.* The court accordingly remanded the case to the district court for trial.[1]

3. Petitioner's first trial ended in a mistrial when the jury deadlocked. Pet. App. 4. At petitioner's second trial, the government introduced evidence concerning an investigation of the fire conducted by agents from the Bureau of Alcohol, Tobacco, and Firearms (ATF). *Id.* at 8. ATF investigators interviewed petitioner, who stated that he was alone in the locked church on the day of the fire until approximately 5 p.m., and that no flammable liquids were stored in the pastor's office, secretary's office, or tape room. *Id.* at 9. After collecting and testing samples of fire debris, and closely examining the church premises, the ATF investigators ruled out all causes of the fire other than arson. *Id.* at 9-12. One of the investigator testified that the agents had found flammable liquid pour patterns on the floors of the secretary's office, pastor's office, and tape room. *Id.* at 11.

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[1] Judge Gilman concurred, relying exclusively on the "use of the church building to record radio sermons," which were to be broadcast commercially, including by an out-of-State radio station. 312 F.3d at 236. Judge Gilman believed that targeting radio broadcasts to people in other States constitutes a "classic activit[y] affecting interstate commerce." *Ibid.*

Those patterns, the investigator testified, indicated that the fire had been set deliberately. *Ibid.* The investigator also expressed the opinion that someone had poured gasoline, diesel fuel, or both in the pastor's office, secretary's office, and tape room, and had also ignited a fire in the southwest corner of the attic. *Id.* at 12.

The church's insurer also examined the church premises after the fire and determined the church to be "an obvious total loss." Pet. App. 12. The church's insurance policy entitled it to receive $778,752 plus an automatic four percent increase, with no requirement to rebuild. *Ibid.* Pursuant to the claims process, petitioner submitted to the insurer a notarized sworn statement and proof of loss that made a claim in the amount of $792,257.70. *Id.* at 13-14.

Two members of the church's Board of Trustees testified that petitioner had been given a power of attorney that authorized him to write checks on the church's bank account without a cosigner. Pet. App. 15. Over petitioner's objection, the government presented evidence of several checks written by petitioner on the church's bank account between 1996 and the time of the fire, including checks petitioner wrote to "cash" and checks issued by petitioner to his credit card company. *Ibid.* Also over petitioner's objection, the church's trustees testified that the Board of Trustees had authorized various expenditures on petitioner's behalf, such as the purchase of a Corvette and a recreational vehicle and the construction of a pastoral facility that included a bedroom, hot tub, and showers. *Id.* at 16. The trustees further explained that petitioner possessed the authority to make such expenditures and that no member of the Board of Trustees or the congregation had ever objected to his use of church funds. *Ibid.* The district court did,

however, sustain several of petitioner's objections to the government's attempts to introduce other evidence of petitioner's access to, and control over, church money. *Ibid.*

At the conclusion of the second trial, the jury found petitioner guilty on all three counts of the indictment. Pet. App. 16. Petitioner filed a motion for a new trial, which the district court denied. *Id.* at 17. The district court sentenced petitioner to 60 months of imprisonment, to be followed by two years of supervised release. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-35.

a. The court of appeals held that the evidence established a nexus between the New Mount Sinai Missionary Baptist Church and interstate commerce that was sufficient to sustain petitioner's conviction for arson under 18 U.S.C. 844(i). Pet. App. 17-19. The court explained that the panel on the prior appeal had rejected petitioner's challenge to the adequacy of the commerce nexus, and that the evidence presented at petitioner's trial was not materially different from the stipulated facts that the earlier panel had considered. *Id.* at 18-19. Under those circumstances, the court concluded, the "law of the case doctrine" precluded it from reexamining whether the evidence in this case satisfied Section 844(i)'s interstate-commerce element. *Id.* at 19.

b. The court of appeals rejected petitioner's challenge to the sufficiency of the evidence underlying his convictions for arson and mail fraud. Pet. App. 19-25. The court explained that the circumstantial evidence introduced at trial, viewed in the light most favorable to the government, was sufficient "for a jury to conclude that the fire at the church had been intentionally set, that [petitioner] was the person who set the fire, and

that he intended to defraud the insurance company and had a scheme to do so." *Id.* at 22-23. In support of that conclusion, the court noted the testimony of the two ATF investigators that flammable pour patterns were discovered in the pastor's office, secretary's office, and tape room, even though petitioner reported that no flammable liquids were stored in those rooms. *Id.* at 23. The court further observed that petitioner had presented no expert testimony indicating a cause and origin of the fire other than arson; that petitioner, by his own admission, was the only person in the church on the day of the fire until approximately 5 p.m. and thus was the only person with the ability to start a fire from inside the church; and that the evidence showed that petitioner had access to and control over church funds and thus would have access to any insurance money collected for the fire. *Id.* at 23-25.

c. The court of appeals held that the district court had not erred in admitting evidence of petitioner's access to and control over church finances. Pet. App. 25-33. In particular, petitioner objected to evidence of his personal expenditures using church funds, the lavish pastoral facility, and his use of the church's tax-exempt status for personal purposes. See *id.* at 25-26. After setting forth factors governing admission of evidence under Federal Rule of Evidence 404(b), see Pet. App. 30-31, the court of appeals noted the absence of any dispute that petitioner had made the expenditures in question, see *id.* at 31. The court further explained that the evidence "was offered to show motive, which is an admissible purpose under Rule 404(b)," and that petitioner's "motivation as to why he would set fire to the church was certainly at issue during his jury trial." *Id.* at 32. The court held that the challenged evidence was "proba-

tive with regard to motive" because petitioner's "access to and control over church finances suggested that he would also have access to and control over the money received from the insurance company." *Ibid.* Finally, the court applied Federal Rule of Evidence 403 and concluded that the district court had not abused its discretion in determining that the prejudicial nature of the evidence admitted did not substantially outweigh its probative value. *Id.* at 32-33. The court explained that the district court had "carefully examined the [probative value] and prejudicial [effect] of each piece of evidence offered to show [petitioner's] control over church finances," and that the district court had excluded evidence that it deemed unduly prejudicial. *Id.* at 33.

ARGUMENT

1. Petitioner contends (Pet. 20-29) that the New Mount Sinai Missionary Baptist Church was not "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," 18 U.S.C. 844(i), and that his conduct therefore was not covered by Section 844(i). That claim lacks merit. On the government's appeal from the district court's order dismissing the Section 844(i) count of the indictment, the court of appeals correctly held that the victimized church had the requisite commercial nexus. See 312 F.3d at 231-236.

In *Jones* v. *United States*, 529 U.S. 848 (2000), this Court set out the standards for determining whether a building is subject to the protections of Section 844(i). In *Jones*, the Court held that Section 844(i) did not apply to the arson of an owner-occupied residence. *Id.* at 850-851. The Court explained that, because Section 844(i) applies to buildings that are "used" in commerce-related activities, the statute "is most sensibly read to

mean active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce." *Id.* at 854-855. Applying that interpretation of the statute, the Court held that the links to interstate commerce on which the government had relied—the dwelling's mortgage and insurance policy from out-of-State companies, and its receipt of natural gas from sources outside the State—did not bring the private home within the protection of Section 844(i). See *id.* at 856.

The court of appeals accurately identified the legal standard announced in *Jones*, see 312 F.3d at 233, and correctly applied that standard to the stipulated facts in this case, see *id.* at 233-236. As the court explained, the church regularly broadcast its services into Tennessee, Mississippi, and Arkansas on four radio stations, one of which was located in Mississippi. Pet. App. 14; 312 F.3d at 234. Paying for those broadcasts was a regular and significant expense of the church, amounting to nearly $17,000 in 1997. Pet. App. 14; 312 F.3d at 234. "[T]he desired effect [of the radio broadcasts] was to increase membership and attendance at the church's worship services and other programs," which in turn resulted in "increased travel into Tennessee from neighboring states." *Ibid.* Based on its recognition that "[c]ausing interstate travel for the purpose of receiving money from the travelers affects the flow of money in commerce, even if the money is a gift," *ibid.* (citing *Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 573 (1997)), the court of appeals correctly held that the victimized church in this case had "direct, regular, and substantial" connections to interstate commerce, *ibid.*

As petitioner explains (Pet. 22-23), other courts of appeals have held that particular churches did not have the connections to interstate commerce needed to trigger the coverage of Section 844(i). See, *e.g.*, *United States* v. *Davies*, 394 F.3d 182, 194-196 (3d Cir. 2005) (holding that purchase of goods from out-of-State sources and transmission of funds to out-of-State church and missions were insufficient to invoke Section 844(i)); *United States* v. *Lamont*, 330 F.3d 1249, 1256-1257 (9th Cir. 2003) (holding that purchase of gas, insurance policy, and other goods from out-of-State sources; interstate and international receipt of funds from parent organization; and receipt and distribution of publications that travel interstate were insufficient to invoke Section 844(i)); *United States* v. *Odom*, 252 F.3d 1289, 1296-1297 (11th Cir. 2001) (holding that receipt of donations from out-of-State donors, use of Bibles and other books purchased from an out-of-State firm, and indirect contributions to an out-of-State religious organization were insufficient to invoke Section 844(i)), cert. denied, 535 U.S. 1058 (2002). In the instant case, however, the Sixth Circuit did not express disagreement with any of those decisions, but rather explained that "[t]he cases cited by [petitioner] involved factual circumstances far different from those" at issue here. 312 F.3d at 235.

In support of its conclusion that the New Mount Sinai Missionary Baptist Church had greater links to interstate commerce than the churches described above, the court of appeals relied in particular on the church's radio broadcasts of its services to a three-State area. 312 F.3d at 234. The court explained that the broadcasts were intended to encourage "increased travel into Tennessee from neighboring states" and involved "active employment of commercial entities, including three ra-

dio stations in Tennessee and one in Mississippi." *Ibid.* Petitioner cites no case in which similar uses of a church (or other building) have been held insufficient to trigger Section 844(i)'s coverage.

Petitioner suggests (Pet. 28) that the church's radio broadcasts are insufficient to trigger Section 844(i)'s coverage because those broadcasts "did not attempt to sell goods or services." That argument lacks merit. Even though the broadcasts did not propose commercial transactions, they involved active employment of commercial radio stations, see 312 F.3d at 234, and they were intended to "generate[] the transportation of persons across state lines that has long been recognized as a form of 'commerce,'" *Camps Newfound/Owatonna*, 520 U.S. at 573. See *id.* at 585 ("Nothing intrinsic to the nature of nonprofit entities prevents them from engaging in interstate commerce."). And while petitioner describes the radio broadcasts as "the most normal of church functions" (Pet. 28), he identifies no evidence suggesting that the typical church broadcasts its services to persons in other States. He simply asserts that "a non-commercial radio broadcast" has only a "passing" connection to interstate commerce. *Ibid.* But in the context of a church's outreach to potential members, the interstate radio broadcasts were integrally tied to interstate commerce.

Petitioner does not dispute that the court of appeals applied the correct legal standard in deciding the question of Section 844(i) coverage, and he does not contend that churches are categorically excluded from the statute's protections. Rather, he argues that the court overstated the significance of the New Mount Sinai Missionary Baptist Church's connections to interstate commerce. That disagreement with the Sixth Circuit's anal-

ysis on the unique facts of this case does not warrant this Court's review.

2. Petitioner contends (Pet. 29-31) that the evidence presented at trial was insufficient to establish beyond a reasonable doubt that he committed the charged offenses. That factbound challenge raises no legal issue of recurring importance. In any event, petitioner's claim lacks merit.

The court of appeals correctly held that petitioner's convictions for arson and mail fraud under 18 U.S.C. 844(i) and 1341 were supported by legally sufficient evidence. Viewed in the light most favorable to the government, see *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), the evidence supported the jury's finding that the fire that destroyed the church was intentionally set, that petitioner was the one who set the fire, and that petitioner intended to defraud the insurance company and had a scheme to do so. Based on their examination of the scene and their interviews with witnesses, two ATF investigators testified that flammable pour patterns were discovered in the pastor's office, secretary's office, and tape room, even though petitioner reported that no flammable liquids were stored in those rooms; that petitioner was the only person inside the church on the entire day of the fire until 5 p.m.; and that petitioner had access to and control over church funds, including any insurance money collected. Pet. App. 8-16. The court of appeals correctly found that evidence sufficient to sustain the jury's verdict, see generally *Holland* v. *United States*, 348 U.S. 121, 140-141 (1954) (rejecting contention that evidence must exclude every hypothesis but that of guilt), and its assessment of the evidentiary record does not warrant this Court's review.

3. Petitioner contends (Pet. 32-37) that the district court committed reversible error in admitting evidence of his access to and control over church finances. That factbound claim also lacks merit.

Federal Rule of Evidence 404(b) authorizes the admission of evidence concerning "other crimes, wrongs, or acts" to prove, inter alia, "motive." As the court of appeals correctly held, evidence concerning petitioner's personal expenditures using church funds, the lavish pastoral facility within the church, and petitioner's use of the church's tax-exempt status for personal purposes was offered to show his motive to burn the church, which "was certainly at issue during [petitioner's] jury trial." Pet. App. 32; see *Huddleston* v. *United States*, 485 U.S. 681, 687-688 (1988) (holding that Rule 404(b) evidence offered for proper purpose may be introduced subject only to "general strictures limiting admissibility such as" relevance). Petitioner's reliance (Pet. 35-36) on Federal Rule of Evidence 403, which provides that relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice," is similarly misplaced. As the court of appeals explained, the district court "carefully examined the [probative value] and prejudicial [effect] of each piece of evidence offered to show [petitioner's] control over church finances," and the district court excluded other evidence that it deemed unduly prejudicial. Pet. App. 33. The court of appeals' conclusion that the district court did not abuse its discretion in admitting the pertinent evidence, see *ibid.*, is correct and raises no issue of broad significance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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